DCPI 2734/09

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION DCPI 2642 of 2009**

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BETWEEN

LO CHUN KONG DARYL Plaintiff

And

WONG TZE KAN 1st Defendant

KONG SIN WAH trading as WAH KEE

TRANSPORTATION SERVICES CO. 2nd Defendant

PIONEER INSURANCE & SURETY

CORPORATION 3rd Defendant

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Coram: Before Master J Chow in Chambers

Date of Hearing: 31st Jan 2011

Date of Handing Down Decision : 28th Feb 2011

DECISION

Introduction

1. This is the Plaintiff’s summons to set aside an unless order and also for time extension (“the Summons”).

Background

1. The Plaintiff sustained multiple injuries in a traffic accident on 5th December 2007 while he was a passenger on board a light goods vehicle driven by the 1st Defendant, whom was an employee of the 2nd Defendant. He claimed damages against both the 1st and 2nd Defendants for their negligence.
2. At the commencement of the proceedings, the Plaintiff was legally aided and was represented by Messrs. Damien Shea & Co. On 31st Dec 2009, the Plaintiff’s solicitors issued a Writ of Summons against the 1st and 2nd Defendants. The 1st and 2nd Defendants did not file an acknowledgement of service within the prescribed time but the Plaintiff made no application for default judgment, the case went dormant.
3. The 1st Checklist Review Hearing was fixed on 11th June 2010, the Plaintiff’s solicitors applied on 3rd June 2010 for an adjournment with reason that the Plaintiff’s health condition was “not stablised”. The Checklist Review Hearing was adjourned to 10th August 2010. On 17th September 2010, the 3rd Defendant, the insurer, was added as a party to the action.
4. On the Plaintiff’s failure to serve the Statement of Claim and Statement of Damages after issuance of the Writ, the 3rd Defendant took out a summons on 26th August 2010 for an unless order against Plaintiff to issue the same. The said summons was heard by Master G. Own on 17th September 2010 and the following order was granted in the absence of the Plaintiff, 1st and 2nd Defendants (“the Unless Order”),

“(1) Unless the Plaintiff do within 14 days from the date of this Order to be made herein file and serve on the Defendants (a) Statement of Claim; (b) Statement of Damages relating to the issue of quantum; and (c) Medical Documents pursuant to Order 18, rule 12(1A) of the Rules of District Court, this action be dismissed with costs; and

(2) The costs of this application be to the 3rd Defendant. ”

1. The Plaintiff’s legal aid certificate was discharged on 11th August 2010, that was why the Plaintiff’s solicitors did not appear for him at the hearing on 26th August 2010.
2. On 1st October 2010, the Plaintiff’s claim was dismissed upon non compliance of the Unless Order. On 5th Oct 2010, the 3rd Defendant’s solicitors wrote to Court to seek an order to vacate the forthcoming Checklist Review Hearing on 19th October 2010. This paper application came before me and I so ordered.

1. On 9th December 2010, the Plaintiff took out the Summons. The Defendant resisted, the argument was heard before me.

Was the Unless Order served?

1. Before considering the merits of the argument, I discovered the Unless Order was only sealed on 30th September 2010 (the day before the expiry of the 14-day period) and no affirmation of service was filed. Surprisingly, the Plaintiff has never protested the service or the Unless Order.
2. Mr. Lau, the 3rd Defendant’s solicitors clarified at the hearing, the sealed order was served “By Confirmed Post” to the Plaintiff on 4th October 2010. That is to say, the Plaintiff was being notified of the Unless Order after it has expired.
3. Mr. Lau thereby conceded, to be fair for the Plaintiff, notwithstanding the time limit specified in the Unless Order, time shall run after the service of the same including a period of 7 days of deemed service, which falls on 11th October 2010. If that is so, the expiry date of the Unless Order shall fall on 25th October 2010, not 1st October 2010.
4. Mr. Lau further submitted, the Plaintiff’s summons came late and has failed to observe the time for obtaining relief as stipulated in Order 2 Rule 4 of the Rules of District Court, which reads,

“Where a party has failed to comply with a rule or court order, any sanction for failure to comply imposed by the rule or court order has effect unless the party in default applies to the Court for and obtains relief from the sanction within 14 days of failure.”

The Plaintiff’s solicitors should have applied for relief within 14 days from 25th October 2010 (i.e. not later than 8th November 2010), they have only taken out the Summons on 9th December 2010, which is almost 4 ½ weeks from the time specified in Order 2 Rule 4. The Plaintiff’s explanations in his affirmation dated 7th December 2010 were not sound reasons for his tardiness.

1. Mr. Lau has sensibly agreed, in light of case management power as conferred in Order 1B Rule 1, the Court has power to consider the Plaintiff’s summons in light of the requirements in Order 2 Rule 5, which were mainly the reasons for non compliance of court orders. Upon such clarification, I agreed to proceed with the Plaintiff’s Summons.

Reasons for Non compliance of the Unless Order and his late application

1. The Plaintiff’s reasons can be summarized as follows:
2. The Plaintiff has been suffering from post traumatic stress disorder throughout 2008 – 2009, he was hospitalized on various occasions.
3. He cohabited with his girlfriend at all material times. This girlfriend was convicted and sentenced for one year imprisonment on 22nd February 2010. The Plaintiff was left alone without her care and attention. His back pain caused irritation, coupled with his psychiatric illness, he “lost interests on anything includes *[sic]* the present action”.
4. Being affected by his psychiatric illness, he claimed he was unable to give instructions to his solicitors. The legal aid certificate was discharged on 11th August 2010.
5. The Plaintiff left his last known address and resided at his friend, Mr. Lee Lok Ming’s premise from June 2010. He did not bring along his mobile phone and could not be reached by his solicitors during the period.
6. By the end of November 2010, the Plaintiff returned to his last known address after his girlfriend’s release, he said his health condition has improved. It was only by that time, the Plaintiff was first aware of the Unless Order. He contacted his solicitors for further action.
7. The Plaintiff said his solicitors advised him that he would “probably be awarded a sum of around $500,000 and was unfair to dismiss his claim for non compliance of order”, there was no inordinate delay in the application and the 1st to 3rd Defendants suffered no injustice.
8. Ms Lam has taken me through the reasons in light of the criteria in Order 2 Rule 5. Apart from that, Ms Lam relied on other authorities on non compliance of Court orders.[[1]](#footnote-1)

The 3rd Defendant’s Submission

1. Mr. Lau objected the Plaintiff’s reasons. He cited the tests in Chan Chun Lung Allen & anor v. Ryland Limited & ors unrep HCA 4904/1996,

“that the relevant question is whether the Plaintiff’s default was intentional and contumelious. The burden rests with the Plaintiff to demonstrate by adducing evidence that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.”

1. In an English case Hytec Information Systems Ltd. v. Coventry City Council [1997] 1 WLR 1666, the threshold of the test was subsequently lowered.[[2]](#footnote-2)
2. In a more recent case Top One International (China) Property Group Company Limited & ors v. Top One Property Group Limited & ors HCA 1244/2009, Fok J revisited the test on issue. It was decided in light of the Civil Justice Reform, the test in Hytec was entirely consistent with the pro-active management approach encouraged, in para 41 therein provides,

“that is to say, although intentional and contumelious disregard of court’s peremptory order may be the most usual circumstance leading to refusal of an extension of time to comply with a peremptory order, the exercise of discretion to refuse an extension or a relieve a party from sanctions is not limited to cases of intentional and contumelious default. As directed by RHC O.2 r.5, the court should consider all the individual circumstances including those listed in r.5(1) at sub paragraphs (a) to (j). Depending on the circumstances, failure to comply with one or a number of orders through negligence, incompetence or sheer indolence may be such as to lead the court to conclude there is an existence and degree of fault which warrants a refusal of an extension of time, so that relief from a sanction for non – compliance specified in a peremptory order (including an order striking out a pleading) should not be granted. Any other conclusion would, in my opinion, be to ignore the positive duty placed on parties to assist the court to further the underlying objectives of CJR (RHC O.1A r.3) and on the court to do so by actively managing cases (RHC O.1A r.4(1))”

Analysis

1. Mr. Lau cited the correct test here. The Plaintiff is obliged to demonstrate with evidence under two limbs: (i) his tardiness of 4½ weeks to seek relief from Court from the sanctioned imposed under the Unless Order and (ii) the reason for non compliance of the Unless Order. In fact, both limbs are inter related. For convenient sake, I shall deal with both of them in light of the requirements in sub paragraphs (a) to (j) of Order 2 Rule 5 of the Rules of District Court.

*Whether the application for relief has been made promptly & whether there is a good explanation for the failure to comply - Order 2 Rule 5(1)(b) & (d) and whether the failure to comply was intentional - Order 2 Rule 5(1)(c)*

1. The Plaintiff blamed he has no knowledge of the Unless Order because he had moved to reside with his friend. Obviously, it was not a sound reason. The Plaintiff chose not to reside at his last known address; he blatantly left the place without bringing along his mobile phone. He made no attempt to notify his solicitors or the Court his new address (even it was meant to be a temporary one). He simply withdrew himself from the proceedings by not maintaining any means of contact during the period. I am also alarmed by the Plaintiff’s attitude of “losing interests in anything, including this proceedings,” this must be one of the worst explanation. His conduct and attitude squarely fall within the “intentional and contumelious default” category, suffice to say he is “negligent, incompetent or sheer indolent”. The Plaintiff has no excuse or excuses whatsoever to justify the non compliance of the Unless Order or to delay of seeking relief from the Court.
2. Secondly, I agree with Mr. Lau that it was not uncommon for victims of traffic accidents to have suffered from post traumatic stress disorder. There was no evidence from the Plaintiff that he was incapable of giving instructions to his solicitors.
3. The Plaintiff failed to make available recent medical evidence save and except one dated 20th March 2009 (see exhibit LCK-2). He was last seen by his treating doctors on 19th March 2009. The diagnosis revealed he has suffered from post traumatic stress disorder and was administrated with medication. I am not satisfied the Plaintiff can demonstrate his incapacity to conduct his case by submitting the said medical report which was compiled 18 months before the relevant period.

*Whether the failure to comply was caused by the party in default or his legal representative - Order 2 Rule 5(1)(f)*

1. There was no evidence from his legal representatives.

*The interests of administration of justice; the effect which the failure to comply had on each party & the effect of which the granting the relief would have on each party – Order 2 Rule 5(1)(a); (i) & (j)*

1. It is a balancing exercise. As the 1st and 2nd Defendants filed no acknowledgement of service, the case was left in abeyance. It proceeded only after the 3rd Defendant, the insurer, intervened. I would say, there was no drastic impact on the 1st to 3rd Defendants in defending the action if the Plaintiff is given an opportunity to proceed. Yet, I have to exercise my pro – active case management powers with caution, the Plaintiff would certainly pitched his case sufficient high to say he should not be deprived of damages of whom he was a victim of the traffic accident. Nonetheless, the Writ has already been issued on 31st December 2009, which is some 15 months from today. The 3rd Defendant is quite right to have applied for an order to conclude the case if there was inaction on the Plaintiff’s part.
2. In absence of any medical reports or medical notes by the Plaintiff, I seriously doubt whether his health condition play a part in the delay of proceedings. If the Plaintiff was found to be a victim in the traffic accident, he should concern his claim diligently. He should have been alerted to court orders or at least to keep himself reachable by his legal representatives. If the Plaintiff was uninterested in the proceedings, he ought to bear the consequence of his conduct. I do not see it is in the administrative justice to grant extension of time to him to proceed with his claim.

Conclusion

1. The Unless Order (with time revised) do stand. The Plaintiff’s Summons be dismissed.

Costs

1. I see nothing in this case should depart from the usual costs order to follow the event. I make a costs order *nisi* that the costs of the Summons be to the 3rd Defendant payable by the Plaintiff forthwith. I shall invite the 3rd Defendant’s solicitors to submit their statement of costs within 14 days from today and the Plaintiff’s solicitors’ to submit their list of objections to the statements of costs within 14 days thereafter for summary assessment.

(J Chow)

Master of the District Court

Ms. Isabella Lam instructed by Messrs. Damien Shea & Co. for the Plaintiff.

Mr. Wong Tze Kan, the 1st Defendant absent.

Mr. Kong Sin Wah, the 2nd Defendant absent.

Mr. CM Lau of Messrs. Lee Kwok & Law for the 3rd Defendant.

1. Chow Kai Sang v. Toi Samuel & ors [1996] 4 HKC 330; Po Kwong Marble Factory Ltd. v. Wah Yee Decoration Co. Ltd [1997] HKLRD 1341; Chiu Sin Chung v. Yu Yan Yan, Angela [1993] 1 HKLR 225; and R. v. Bloomsbury and Marylebone County Court, ex p Villerwest Ltd [1976] 1 All ER 897. [↑](#footnote-ref-1)
2. Per Auld LG at p.1677, “In my judgment, there is no need to confine the test to that of an intentional disregard of a court’s peremptory order, whether or not it is characterized as flouting, contumelious, contumacious, perverse, obstinate or otherwise. Such an intent may be the most usual circumstance giving rise to the exercise of this jurisdiction. But failure to comply with one or a number of orders through negligence, incompetence or sheer indolence could equally qualify for it exercise. It all depends on the individual circumstances and the existence and degree of fault found by the court after hearing representations to the contrary by the party whose pleading it is sought to strike out.” [↑](#footnote-ref-2)